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IN THE

Supreme Court of the United States

October Term, 1947
No. 259

ARNOLD BERNSTEIN, also known as Arnold M. Bernstein,

Petitioner,

against

N. V. NEDERLANDSCHE-AMERIKAANSCHE STOOMVAART-MAATSCHAPPIJ, also known as Holland-America Line,

Respondent.

PETITION OF ARNOLD BERNSTEIN FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION OF ARNOLD BERNSTEIN FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Arnold Bernstein, respectfully prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Second Circuit made herein May 23, 1947 (p. 85, fol. 87; p. 89, fol. 93). A petition for rehearing was made and filed under Rule 28 of the said Circuit on June 6, 1947 (pp. 90-95) and denied on June 9, 1947 (p. 96, fols. 101-103).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347). The decision of the Circuit Court of Appeals is ~~not yet~~ officially reported. 161 F. (2d) 733.

Questions Presented

1. Is the decision of this Court in *Catlin* v. *United States,* 324 U. S. 229, applicable to the order of the District Court herein, permitting the defendant to serve a third-party complaint, and to the appeal to the United States Circuit Court of Appeals, Second Circuit, therefrom; this action not being one relating in any way to the condemnation of property by eminent domain?

2. Is the sentence of the opinion in *Catlin* v. *United States,* at page 233, reading: "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." intended to affect the authority of the decisions of this court in *Ray* v. *Law,* 3 Cranch 179, and subsequent cases, hereinafter cited, relating to appeals from final decisions of the District Court of the United States, or is it intended to apply to appeals in condemnation proceedings only?

3. Is the said sentence in *Catlin* v. *United States, supra,* intended to change or modify in any way the rule enunciated by this Court in *Forgay* v. *Conrad,* 6 How. 201, at page 203, as follows:

> "The question upon the motion to dismiss is whether this is a final decree, within the meaning of

> the acts of Congress. Undoubtedly, it is not final, in the strict, technical sense of that term. But this court has not heretofore understood the words 'final decrees' in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature.",

or to change or modify the rule laid down by the decisions of this court which have followed, with slight modifications, *Ray* v. *Law, supra,* and *Forgay* v. *Conrad, supra.*

Statutes Involved

Section 22, Ch. 20, 1st Session, 1st Congress, approved September 24, 1789, in part as follows:

> "* * * that final decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a circuit court. * * *"

United States Code, Title 28, Sec. 225 (Judicial Code, sec. 128 as amended) in part as follows:

> "(a) Review of final decisions. The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—
>
> First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title."

Summary and Short Statement of the Matter Involved

In dismissing the appeal for lack of jurisdiction, and declining to consider, therefore, the grounds (under the decisions) on which the appeal should be heard and the order of the District Court reversed, either as of right or as a matter of discretion, the Circuit Court of Appeals disregarded the overwhelming authority of the cases herein referred to.

The question came before the Circuit Court of Appeals on a motion to dismiss an appeal from an order bringing into the action a third-party defendant, under the provisions of Rule 14(a) of the Federal Rules of Civil Procedure. The plaintiff, a citizen of the United States and of the State of New York, brought the action against the defendant, a foreign corporation. The defendant moved for an order bringing in the Chemical Bank & Trust Company, a New York corporation, as a third-party defendant. In an action where the plaintiff is also a citizen of the State of New York this would compel litigation between residents of the same state, in violation of the constitutional and statutory provisions (U. S. Constitution, Art. 3, Sec. 2; Judicial Code, Sec. 24 amended; U. S. C. Title 28, Sec. 41(1), as recently construed by this Court in *City of Indianapolis* v. *Chase National Bank*, 314 U. S. 63, rehearing denied 314 U. S. 714), and the plaintiff upon that ground opposed the motion.

The District Court granted the motion, saying (Rec., p. 76, fol. 228):

> "If a defendant's motion under Rule 14 to bring in a third-party defendant is *solely for the purpose of offering him to the plaintiff as a party defendant*

> who may also be liable to the plaintiff for all or part of the plaintiff's claim against the original defendant, the third-party defendant must be a citizen of a state other than plaintiff's. (***Friend*** **v.** ***Middle Atlantic Transportation Co., et al.,*** **153 F. 2d 778.) Any judgment recovered by a plaintiff against a third-party defendant of the same citizenship as plaintiff is void because of lack of jurisdiction of the Federal Court over such claim, if the claim of plaintiff against the third-party defendant *is based on a state created right* and does not involve a Federal question. That is what the Circuit Court of Appeals, Second Circuit, held in the *Friend* case (*supra*).'' (Italics supplied.)**

The plaintiff appealed from the order and the defendant moved to dismiss the appeal upon the ground that the order was not a final order. The Circuit Court of Appeals granted the motion (p. 85, fol. 87; p. 89, fol. 93). Its complete opinion (written on the back of the motion papers) is, "Appeal dismissed on authority of *Catlin* v. *United States*, 324 U. S. 229'' (p. 85, fol. 87). The instant case does not involve proceedings in condemnation in any way. *Catlin* v. *United States* relates wholly to appeals in condemnation proceedings.

Specification of Errors to be Urged

1. The Circuit Court of Appeals erred in holding that the order appealed from was not appealable.

2. The Circuit Court of Appeals erred in applying the decision of this court in *Catlin* v. *United States*, 324 U. S. 229, or any portions of the opinion therein, to a case which does not involve condemnation proceedings.

The Reasons Relied On for the Allowance of the Writ

In *Magnum Import Co.* v. *Coty*, 262 U. S. 159 at p. 163, Chief Justice Taft stated the purposes for granting a writ of certiorari as follows:

> "• • • The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort."

Both of these purposes exist here. The decision which it is sought to review is contrary to many prior decisions in this court and in the several Circuit Courts of Appeal, including the Second Circuit. Uniformity of decisions can be obtained if the writ herein applied for is granted and a decision thereafter made by this Court.

As it is the first case, on this question, involving Section 14(a) of the new Federal Rules of Civil Procedure, it involves also a question of importance which it is in the public interest to have decided by this Court of last resort.

The decision below is one of the only two decisions we have found (the other being *Baltimore & O. R. Co.* v. *United Fuel Gas Co.*, 154 F. 2d 545, Fourth Circuit), construing either the words "final decrees and judgments" or the words "final decisions" in a strict and technical sense (except in criminal cases, ordinary interlocutory orders, and condemnation proceedings), since this Court in *Ray* v. *Law*, 3 Cranch 179, by the procedure there followed, construed the words

"final judgments and decrees" more liberally, and since this Court in *Forgay* v. *Conrad*, 6 Howard 201, 204, announced that the more liberal rule heretofore quoted from that case had always been followed by this Court. This more liberal construction has been placed upon the words in 101 cases, and includes decisions in the 1st, 2nd, 3rd, 4th, 5th, 7th, 8th, 9th and 10th circuits. As the cases are so numerous, we list only the cases in this court and those in the Second Circuit, and quote from one case in this court and call attention to one holding (in the Second Circuit, two) in each of the nine circuits which have followed the rule.

Those in this court which follow *Ray* v. *Law*, *supra*; or *Forgay* v. *Conrad*, *supra*, or *Thomson* v. *Dean*, 7 Wall. 342, or more than one of them, are:

Whiting et al. v. *The Bank of the United States*, 38 U. S. 6, 15;
Bronson v. *La Crosse & M. R. R. Co., et al.*, 67 U. S. 524, 531;
R. R. Co. v. *Bradleys*, 74 U. S. 575, 577;
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Chicago, D. & V. R. Co. v. *Fosdick*, 106 U. S. 47, 83;
Winthrop Iron Co. v. *Meeker*, 109 U. S. 180, 183;
Hanrick v. *Patrick*, 119 U. S. 156, 164;
In Re Farmers Loan & Trust Co., 129 U. S. 206, 213;
Hill v. *Chicago & Evanston Railroad Co.*, 140 U. S. 52, 54;
Mclish v. *Roff*, 141 U. S. 661, 666;
La Bourgogne, 210 U. S. 95, 113;
North Carolina R. R. v. *Story*, 268 U. S. 288, 291;

Gulf Refining Co. v. *United States,* 269 U. S. 125, 136;
Clark v. *Williard,* 292 U. S. 112, 119;
Knox National Farm loan Ass'n v. *Phillips,* 300 U. S. 194, 198;
Radio Station WOW v. *Johnson,* 326 U. S. 120, 125.

In addition to the foregoing, there are a number of cases in this Court recognizing the principle of liberal construction above referred to, but distinguishing the case then under consideration on the facts.

Those cases in the Second Circuit which follow the rule in *Forgay* v. *Conrad, supra; Ray* v. *Law, supra,* or *Thomson* v. *Dean, supra,* are:

The Alert, 61 F. 113, 115;
Tuttle v. *Claflin,* 66 F. 7, 8;
Gay v. *Hudson River Electric Power Co.,* 184 F. 689;
Central Trust Co. v. *Chicago, R. I. & P. R. Co.,* 218 F. 336;
Odell v. *H. Batterman Co.,* 223 F. 292, 295;
Gas & Electric S. Co. v. *Manhattan & Queens Trac. Corp.,* 266 F. 625, appeal dismissed sub nom. *Begg* v. *City of New York,* 262 U. S. 196;
Am. Eng. Co. v. *Metropolitan,* 275 F. 40, 42;
Am. Brake Shoe v. *N. Y. Rys. Co.,* 282 F. 523;
Sullivan v. *Associated Billposters and Distributors,* 6 F. 2d 1000, 1002;
United States v. *Radice,* 40 F. 2d 445;
Collins v. *Metro-Goldwyn Pictures Corporation,* 106 F. 2d 83, 85;
United States v. *243.22 Acres of Land,* 129 F. 2d 678, 681.

No Circuit Court of Appeals cases except this one and *Baltimore & O. R. Co.* v. *United Fuel Gas Co.*, 154 F. 2d 545, dispute or fail to follow the rule laid down by this Court in the *Ray, Forgay* and *Thomson* cases, *supra.*

In *United States* v. *River Rouge Co.*, 269 U. S. 411, 414, argued in 1924 and decided in 1926, the last case decided in this Court on the law as it was before the amendments of February 13, 1925, and while appellate procedure was by writs of error or appeal, this Court said:

> "* * * While the general rule requires that a judgment of a federal court shall be final and complete before it may be reviewed on a writ of error or appeal, it is well settled that an adjudication final in its nature as to a matter distinct from the general subject of the litigation and affecting only the parties to the particular controversy, may be reviewed without awaiting the determination of the general litigation. * * *"

The quotations from and references to the ten Circuits follow:

1st Circuit:

Rubert Hermanos, Inc. v. *People of Puerto Rico,* 118 F. 2d 752, page 757:

> "A 'final decision' is not necessarily the ultimate judgment or decree completely closing up a proceeding. In the course of a proceeding there may be one or more final decisions on particuar phases of the litigation, reserving other matters for future determination. See *Knox National Farm Loan Ass'n* v. *Phillips,* 300 U. S. 194, 197, 198, 57 S. Ct. 418, 81 L. Ed. 599, 108 A. L. R. 738; *Trustees* v. *Greenough,* 105 U. S. 527, 26 L. Ed. 1157; *Gay* v. *Hudson River*

Electric Power Co., 2 Cir., 184 F. 689; *Dant & Russell* v. *J. D. Halstead Lumber Co.*, 9 Cir., 103 F. 2d 306. The words 'final decisions,' like the equivalent 'final judgments and decrees' in former acts regulating appellate jurisdiction, have not been understood in a strict and technical sense, but have been given a liberal and reasonable construction. *Forgay* v. *Conrad*, 6 How. 201, 203, 12 L. Ed. 404; *City of Eau Claire* v. *Payson*, 7 Cir., 107 F. 552, 557."

2nd Circuit:

Gay v. *Hudson River Electric Power Co.*, 184 Fed. 689, pages 692-693:

> "* * * The question whether such an order does or does not 'invade the established rights of the petitioners contrary to law, in such a manner that they can have no relief except by an appeal,' is certainly presented upon the record; and for that reason the cause is within the principle laid down in *Farmers' Loan & Trust Company*, 129 U. S. 206, 9 Sup. Ct. 265, 32 L. Ed. 656."

Also, *Odell* v. *H. Batterman Co.*, 223 Fed. 292, page 295:

> "* * * Under the decisions an adjudication is a final appealable order if it involves a determination of a substantial right against a party in such a manner as leaves him no adequate relief except by recourse to an appeal."

It will be noted from the list of decisions hereinbefore set out that the Second Circuit Court of Appeals had followed the decisions in *Gay* v. *Hudson River Electric Power Co.*, *supra*, and *Odell* v. *H. Batterman Co.*, *supra*, consistently in different cases until the contrary decision in this case.

3rd Circuit:

In the case of *Bank of Taiwan* v. *Gorgas-Pierie Mfg. Co.*, 273 F. 660, the court said at page 661:

> "This appeal is from an order of interpleader. The plaintiff-appellee moves to dismiss the appeal on the ground that the order is not final. The order aligns the parties, prescribes the method of procedure, and—as it will presently be seen—finally denies to one of the parties the right to assert a contract obligation against another. We regard the order as final within the meaning of the statute, and, accordingly, deny the motion to dismiss the appeal. *Killian* v. *Ebbinghaus*, 110 U. S. 568, 4 Sup. Ct. 232, 28 L. Ed. 246; *Standley* v. *Roberts*, 59 Fed. 836, 8 C. C. A. 305; *Hayward & Clark* v. *McDonald*, 192 Fed. 890, 113 C. C. A. 368; *McNamara* v. *Provident Sav. Soc.*, 114 Fed. 910, 52 C. C. A. 530; *Huxley* v. *Pennsylvania Warehousing & Safe Deposit Co.*, 184 Fed. (C. C. A. 3d) 705, 106 C. C. A. 659."

and, at pages 663-664:

> "* * * We do not regard it to be a matter of legal indifference whether the Bank of Taiwan shall interplead with the party whose obligation it holds or with the party with which it has never had dealings. *American Steel Co.* v. *Irving National Bank* (C. C. A.) 226 Fed. 41, 43. We can conceive certain advantages of procedure and of evidence available to it in enforcing payment of the draft against the bank on whose authority it was drawn, of which it would be deprived if it were forced to litigate the contract between the Gorgas-Pierie Company and the Nanyo Company to which it was neither a party nor a privy. *American Steel Co.* v. *Irving National*

Bank, supra; In Matter of Agra and Masterman's Bank, L. R. 1867 Ch. App. 391; *Frey & Son, Inc.,* v. *Sherburne Co.,* supra."

4th Circuit:

In *East Coast Cedar Co.* v. *People's Bank of Buffalo, N. Y.,* 111 F. 446, certiorari denied 184 U. S. 699, the court cited and followed *Thomson* v. *Dean, supra,* and *Forgay* v. *Conrad, supra.*

5th Circuit:

Vicksburg, S. & P. Ry. Co. v. *Schaff,* 5 F. 2d 610, at page 611, cites and follows *Credits Commutation Co.* v. *U. S.,* 177 U. S. 311; *Central Trust Co.* v. *Chicago R.I. & P.R. Co.* (2nd Circ.), *supra; U. S.* v. *Northwestern Development Co.,* 203 F. 960 (9th Circ.) and *Western Union Tel. Co.* v. *U. S. & Mex. Tr. Co.,* 221 F. 545 (8th Circ.).

7th Circuit:

In *City of Eau Claire* v. *Payson, et al.,* 107 F. 552, the court said at page 557:

> "The supreme court has not placed upon the words 'final decree', respecting the right of appeal, a strict and technical sense, but has given them a liberal and reasonable construction. *Forgay* v. *Conrad,* 6 How. 201 * * * *Williams* v. *Morgan,* 111 U. S. 684, 699, * * * *In re Farmers' Loan & Trust Co.,* 129 U. S. 206, * * *."

8th Circuit:

In *Rector* v. *United States,* 20 F. 2d 845, at p. 872, the court said:

> " * * * It is certain that an order is final and appealable if it is of a character which settles substantial rights; which makes no reservation as to its effect; which is designed to be operative in a way affecting such rights at once or before or irrespective of the final decree in the main litigation."

A reading of the opinion of Presiding Judge Kimbrough Stone there shows that he had, in that case, reviewed approximately fifty decisions.

9th Circuit:

Bedgisoff v. *Cushman,* 12 F. 2d 667, recognizes *Gay* v. *Hudson River Electric Power Co., supra; Central Trust Co* v. *Chicago R.I. & P.R. Co., supra,* and *Odell* v. *H. Batterman Co., supra,* as correct, but not applicable, decisions. They are all decisions of the Circuit Court of Appeals for the Second Circuit. However, the court did review the order made in the discretion of the court below; found that the discretion of the court below had been exercised arbitrarily, and issued a writ of mandamus requiring the case to be set for trial before a specified date.

10th Circuit:

Kasishke v. *Baker,* 144 F. 2d 384, at p. 386, cites *Forgay* v. *Conrad, supra; Thomson* v. *Dean, supra; Rubert Hermanos Inc.* v. *People of Puerto Rico, supra,* and several other cases.

Supporting Brief

The court below has plainly misapplied the decision of this Court in *Catlin* v. *United States, supra.*

The dismissal of the appeal here is also erroneous under the construction placed on the words "final judgments and decrees" and their equivalent "final decisions" by repeated decisions of this Court.

> "The words: 'final decision in the district courts' mean the same thing as 'final judgments and decrees' as used in former acts regulating appellate jurisdiction." (*Ex Parte Tiffany,* 252 U. S. 32, at page 36.)

It is also erroneous under the decisions in nine of the ten circuits.

The case, as the record shows, is an important one, based on a claim for damages amounting to millions of dollars.

Substantive rights of the plaintiff under both the Fifth and Seventh amendments to the Constitution are involved.

Every one of the grounds cited by Judge Kimbrough Stone (in *Rector* v. *United States, supra,* page 12), after an exhaustive study of the decisions, as making an order final and appealable, is present here: the order is of a character which settles substantial rights; it makes no reservation as to its effect; it is designed to be operative in a way affecting such rights at once and before and irrespective of the final decree in the main litigation.

It cannot be doubted that the bringing into a case, triable by a jury under the Seventh Amendment to the Con-

stitution, of a corporate third-party defendant of the same state citizenship as the plaintiff, affects substantial rights in the way described by Judge Kimbrough Stone.

An interesting case is *Bank of Taiwan* v. *Gorgas-Pierie Mfg. Co., supra,* in which the Third Circuit Court of Appeals, reversing the order below, stated (see quotations, *supra,* page 11), that such order "aligns the parties, prescribes the method of procedure, and * * * finally denies to one of the parties the right to assert a contract obligation against another". Here the order below "aligns the parties" and "prescribes the method of procedure", and finally requires the plaintiff to accept as a party to the suit a third-party which holds none of his property, against which he asserts no claim, with which he "has never had dealings", and to the dealings of which with the defendant he "was neither a party nor a privy"; all of which—as in the *Bank of Taiwan* case—is not "a matter of legal indifference" but, on the contrary, deprives the plaintiff of "certain advantages of procedure and of evidence" that go to the essence of his remedy.

As to the remaining questions and errors specified, it is sufficient to point out that the decision below is contrary to forty decisions in this Court and at least sixty-one decisions in the Circuit Courts of Appeals, twelve of them heretofore made in the Second Circuit itself. Apparently in the case at bar the Circuit Court of Appeals for the Second Circuit has not only reversed its own prior decisions but has made a decision contrary to the decisions in nine of the other circuits. Which line of decisions it will follow in future cases is uncertain. There should be uniformity of decisions and that can be attained only through the action of this Court of last resort.

In addition, considerations presented under the captions "Questions Presented", "Specification of Errors to be Urged" and "The Reasons Relied on for the Allowance of the Writ", are, each in itself, statements of reasons why this writ should be granted.

Incidentally, the case of *St. Louis I. M. & S. Ry. Co.* v. *Southern Express Co.*, 108 U. S. 24, cited in *Catlin* v. *U. S.*, *supra*, differs greatly on its facts from the case here. There the motion to dismiss the appeal was denied.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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